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Judicial Recovery for the Post-Service Tort: A Veteran's Last Battle

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Judicial Recovery for the Post-Service Tort: A Veteran's Last Battle

Throughout the 1940s and 1950s the United States government conducted experimental tests on unknowing military personnel.[1] The government never informed these people of the potential for future injury as a result of the tests.[2] Moreover, in many cases the government intentionally concealed the facts surrounding these experiments from the servicemen.[3] For example, over 200,000 troops have been exposed to radiation.[4] At times troops were stationed so close to an atomic blast that the bones in their forearms were visible through their closed eyes.[5] Troops have been ordered to march toward the atomic blast site and ordered so close that they were stopped by heat and wind.[6] The only precaution taken by the military was to sweep the dust off the soldiers with a broom.[7] Veterans believe that this exposure to radiation is now causing them to contract cancer. A study performed at the Center for Disease Control in Atlanta, Georgia corroborates their belief.[8] The study indicates that nearly twice the expected leukemia[9] is found among veterans who attended the "Shot Smoky" atmospheric atomic bomb test in 1957.[10] Another study conducted by the National Association of Atomic Vets noted a higher rate of maladies thought to be linked with radiation in veterans who witnessed atomic tests.[11] Exposure to radiation has been linked to cancer and sterility.[12] Radiation is also known to cause chromosome damage resulting in severe mental and physical birth defects in children whose parents were exposed to

1. *See* Comment, *Radiation Injury and the Atomic Veteran: Shifting the Burden of Proof on Factual Causation*, 32 HASTINGS L.J. 933, 934-35 (1981). This writer has made an attempt to use non-sexist language in this comment whenever its use would not interfere with the flow of the text.
2. *Id.* at 936.
3. *See generally* Everett v. United States, 492 F. Supp. 318 (S.D. Ohio 1980); Schnurman v. United States, 490 F. Supp. 429 (E.D. Va. 1980); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979); *See* Comment, *supra* note 1, at 936.
4. *See* De Dominicis, *Frustrated by the Feres Doctrine and the Veterans Administration, Atomic Vets Are Seeking Help From Congress and the Courts*, CAL. LAW., June 1982, at 31.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

the radiation.[13]

Radiation, however, is not the only harmful substance servicemen have been exposed to. The military also exposed these human "guinea pigs"[14] to sulphur mustard gas and L.S.D.,[15] and during the Vietnam war servicemen were also exposed to Agent Orange, a toxic chemical defoliant.[16] Over eleven million gallons of Agent Orange herbicide were sprayed over the jungles in Vietnam.[17] Soldiers lived in the jungles and waded through the streams saturated with Agent Orange completely unaware of the devastating physical effects of this chemical.[18] After these men were discharged, the military discovered that exposure to the chemical was harmful to humans, yet the government never informed the veterans of this discovery.[19] The effects of exposure to Agent Orange are being discovered only now and include cancer, liver ailments, and nervous disorders.[20] Agent Orange also affects the reproductive organs and has been identified as a cause of still births and birth defects.[21]

Veterans injured by these toxic substances are barred from seeking redress against the government under the Federal Torts Claims Act[22] due to court created governmental immunity for injuries that arise out of military duty.[23] The only benefits these veterans may receive are recovered through the Veteran's Administration System.[24] Veterans exposed to toxic substances receive virtually no compensation due to problems with proof of causation and the fact that decisions of the Veterans Administration (hereinafter referred to as the V.A.) are not appealable.[25] The V.A. has received approximately 700 claims from veterans with cancer allegedly caused by exposure to radiation.[26] As of

13. *Id.* at 31, 35.
14. M. UHL & T. ENSIGN, G.I. GUINEA PIGS (1981) (the term human guinea pigs is the title of the book about radiation experiments conducted on servicemen).
15. Lysergic Acid Diethylamide.
16. *See, e.g., Thornwell*, 471 F. Supp. at 346 (L.S.D. experimentation); *Everette*, 492 F. Supp. at 319 (intentional exposure to radiation); *Schnurman*, 490 F. Supp. at 430 (exposure to mustard gas); Comment, *supra* note 1, at 934-35.
17. *See* Assemblyman Pat Nolan, News Release, July 6, 1981 (copy on file at the *Pacific Law Journal*).
18. *See* Assemblyman Pat Nolan, News Release, February 18, 1982 (copy on file at the *Pacific Law Journal*).
19. *See, e.g.*, note 3 *supra* (examples of cases where injuries are emerging years after exposure).
20. *See* Assemblyman Pat Nolan, News Release, April 14, 1981 (copy on file at the *Pacific Law Journal*).
21. *See* News Release, *supra* note 18.
22. 28 U.S.C. §§2671-2680 (1976) [hereinafter referred to as the F.T.C.A.].
23. *See generally* Feres v. United States, 340 U.S. 135, 146 (1950).
24. *See* 340 U.S. at 146. *See generally* 38 U.S.C. §§1-5228 (1976) (provides for veterans benefits).
25. *See* De Dominicis, *supra* note 4, at 937; Comment, *supra* note 1. The V.A. has denied ninety-eight percent of the claims for injuries claimed to be radiation related.
26. *See* De Dominicis, *supra* note 4, at 31.

June 1982, only 16 of these claimants have been awarded benefits.[27] Furthermore, children born with deformities and other birth defects allegedly caused by their father's exposure to radiation, are not provided any compensation under the veteran's benefit statute.[28] This lack of compensation by the V.A. has forced veterans to seek judicial relief against the United States government for their childrens' injuries.[29] The well established doctrine of governmental immunity, however, has prevented veterans from any recovery.[30]

Veterans have attempted to overcome this immunity in a variety of ways, but they have met with little success in the courts.[31] Veterans have asserted a wide range of theories and approaches in their battle including claims of constitutional violations against the government[32] and government officers, claims brought on behalf of children,[33] claims construed as arising out of nonservice activities,[34] and claims involving a separate tort occurring after service.[35] The focus of this comment will be on the post-service tort.

A cause of action for a post-service tort is based on the theory that although a tort may begin during military service, the military has a duty after the veterans are discharged to rescue them from the harm caused during service.[36] The post-service tort theory allows governmental immunity for injuries inflicted on servicemen during military duty but demands recovery for injuries the veterans incur after discharge.[37] The veterans exposed to dangerous substances during service must bring suit after their discharge for governmental failure to reveal the nature of the exposure upon their discharge.[38] The claims asserted are based on the theory that if the servicemen knew what they had been exposed to, they could have sought medical aid immediately after

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27. *See id.*

28. The statute provides for benefits to "any veteran thus disabled." 38 U.S.C. §334 (1976) (because the child is not a veteran he or she will not recover).

29. *See, e.g.*, Monaco v. United States, 661 F.2d 129, 130 (9th Cir. 1981); Hinkie v. United States, 524 F. Supp. 277, 279 (E.D. Penn. 1981).

30. *See* De Dominicis, *supra* note 4, at 35.

31. *See* Comment, *supra* note 1, at 960.

32. *See* Jaffee v. United States, 663 F.2d 1226, 1228 (3rd Cir. 1981), *cert. denied*, 102 S. Ct. 2234 (1982).

33. *See generally* Monaco v. United States, 661 F.2d 129 (9th Cir. 1981) (denied the cause of action); Hinkie v. United States, 524 F. Supp. 277 (E.D. Penn. 1981) (allowed a cause of action for the chromosome damaged child).

34. *See generally* Brooks v. United States, 337 U.S. 49 (1949); Mills v. Tucker, 499 F.2d 866 (9th Cir. 1974); Knecht v. United States, 144 F. Supp. 786 (E.D. Penn. 1956) *affd.* 242 F.2d 929 (3rd Cir. 1957).

35. *See* Thornwell v. United States, 471 F. Supp. 344, 349 (D.D.C. 1979); Everett v. United States, 492 F. Supp. 318, 320 (E.D. Va. 1980).

36. 471 F. Supp. at 349-51.

37. *Id.*

38. *Id.*

discharge.[39]

This comment will explore the post-service tort theory by first reviewing the history of governmental immunity for injuries arising out of military service;[40] then outlining the development of the post-service tort, with an explanation of its modern definitions. This comment will also demonstrate that the post-service tort is compatible with the rationale used for military immunity by analyzing the post-service tort under the test expressed by the United States Supreme Court. Policy factors that support the acceptance of this theory will also be discussed.[41] Finally, this comment will argue that the post-service tort should be accepted by the courts to prevent similar post-service injuries to servicemen in the future and insure that timely follow-up care is provided in similar situations.

THE HISTORY OF GOVERNMENTAL IMMUNITY FOR TORT DAMAGES ARISING OUT OF MILITARY SERVICE

In 1946 the Federal Tort Claims Act[42] (hereinafter referred to as the F.T.C.A.) stripped the United States government of sovereign immunity. The F.T.C.A. gives the federal courts subject matter jurisdiction over claims for injuries caused by the negligent or wrongful act or omission of any government employee.[43] The government employee must be acting in the scope of his employment and under circumstances where a private person would be liable in accordance with the laws of the place where the act occurred.[44] Thus, if a private person would be liable to suit, so will the United States government. The F.T.C.A. provides for statutory immunity from any claims that arise in a foreign country and claims that arise out of combat.[45] The F.T.C.A. does not, however, contain any provision that specifies its application or non-application to a member of the armed forces in other than combat situations.[46] The congressional debates concerning the F.T.C.A. contain no language upon which servicemen can base tort claims.[47] The F.T.C.A. was therefore left to judicial interpretation. Generally it

39. *Id.*; *see also* 492 F. Supp. at 325.

40. Governmental immunity will be referred to as military immunity, although it is actually governmental immunity for injuries which arise out of military service.

41. *See generally* Comment, *Duty to Warn as an Inroad to the Feres Doctrine: A Theory of Tort Recovery for the Veteran*, 43 OHIO L.J. 267 (1982) (general discussion of the same topic).

42. 28 U.S.C. §§2671-2680 (1976).

43. *Id.*

44. *Id.* §1346(b).

45. *Id.* §2680(j), (k).

46. "No Federal law recognizes a recovery such as the claimants seek." Feres v. United States, 340 U.S. 135, 144 (1950).

47. *Id.* at 138.

has been liberally interpreted in favor of governmental liability.[48] However, four years after the F.T.C.A. was enacted the Supreme Court created one broad exception to governmental liability-governmental immunity for claims arising out of military service. In *Feres v. United States*,[49] Justice Jackson, writing for the majority, held that "the government is not liable for injuries to servicemen where the injuries arise out of, or are in, the course of an activity incident to service."[50] Feres, a serviceman, died in a barracks fire caused by the negligent maintenance of a heater.[51]

The *Feres* doctrine has been criticized by many courts and commentators.[52] Some critics have advocated abolition of the doctrine because of the possibility of unfair results by allowing minimal recovery of veterans benefits in cases where injuries have been severe or intentional.[53] Yet despite this criticism, in the thirty-two years since *Feres* was decided,[54] Congress has not altered the statute and the courts have been forced to uphold governmental immunity.[55]

During the 1960's and 1970's, governmental liability was expanded by the courts to allow recovery in many areas.[56] The door was slammed on military liability, however, in 1977 when the Supreme Court decided *Stencel v. United States*[57] which reaffirmed *Feres*.[58] Since the *Feres* and *Stencel* decisions, veterans and servicemen have been forced to develop new legal theories to avoid the harsh result imposed by military immunity.

THE DEVELOPMENT OF THEORIES USED TO AVOID MILITARY IMMUNITY

Many theories have been used and rejected in an attempt to circumvent the *Feres* doctrine. One of the first theories to become judicially

48. *See Id.* at 138. *See generally* Note, *From* Feres *to* Stencel: *Should Military Personnel Have Access to FTCA Recovery*? 77 MICH. L. REV. 1099 (1979) (contains a general discussion of the FTCA and military immunity).

49. 340 U.S. 135 (1950).

50. *Id.* at 146.

51. *Id.*

52. *See* Jaffee v. United States, 663 F.2d 1226, 1228-29 (3rd Cir. 1981), *cert. denied*, 102 S. Ct. 2234 (1982). *See generally* Peluso v. United States, 474 F.2d 605 (3rd Cir. 1972), *cert. denied*, 414 U.S. 879 (1973) (three justices dissenting); *Thornwell*, 471 F. Supp. 344; De Dominicis, *supra* note 4, at 30. The above authorities criticize the *Feres* doctrine because of possible unjust results.

53. *See supra* note 52.

54. *See, e.g.*, 663 F.2d at 1247.

55. *See* Broudy v. United States, 661 F.2d 125, 127 (9th Cir. 1981); Stanley v. CIA, 639 F.2d 1146, 1152 (5th Cir. 1979).

56. *See, e.g.*, United States v. Yellow Cab Co., 340 U.S. 543, 550 (1950); United States v. Aetna Cas. and Sur. Co., 338 U.S. 366, 383 (1949).

57. 431 U.S. 666 (1977).

58. The court prohibited a third party claim for the faulty design of an ejection system which caused permanent injuries to a serviceman. *Id.* at 669.

recognized was stated in *Brooks v. United States*.[59] While on furlough from the army, Brooks was driving on a public highway and was hit by a military vehicle.[60] The court nevertheless determined that Brooks' injuries were only remotely related to his military duty and therefore allowed recovery.[61] It must be noted that the *Brooks* cause of action only allows recovery in rare situations when the government is somehow at fault but the negligence is not related to military duty.[62] Veterans who have been exposed to toxic substances have not recovered under this theory.[63] The courts have reasoned that exposure to the radiation and Agent Orange occurred during military duty and thus was service related.[64]

Veterans have also attempted to avoid *Feres* by bringing a cause of action against individual officers and Defense Department officials alleging that these individuals denied the veterans their constitutional rights by exposing them to dangerous substances without notice.[65] This theory has also been unsuccessful.[66] The courts have denied recovery under the constitution, stating that this basis for recovery would interfere with the jurisdiction and procedure of the V.A. and the important military function of protecting the country.[67]

Recently the Supreme Court denied certiorari in *Jaffee v. United States*[68] in which the serviceman sought recovery for cancer caused by exposure to radiation. The claims were based on constitutional violations.[69] In *Jaffee* the Court held that a soldier did not have a cause of action directly under the Constitution against the United States government and various named individuals for knowingly, deliberately, and recklessly disregarding the knowledge that they were exposing plaintiff to a grave risk of injury by compelling him to participate in a radiation test of a nuclear device.[70] The court reasoned that the plaintiff had a

59. 337 U.S. 49 (1949).

60. *Id.* at 50; *see* United States v. Brown, 348 U.S. 110, 114 (1954) (the court distinguished *Brooks* thus not overruling it); Comment, *supra* note 41, at 270.

61. The Supreme Court allowed Brooks who was a serviceman to recover damages minus his V.A. compensation benefits stating that because he was not on duty at the time of the injury, the injury was only remotely related to military service and not barred by *Feres*. 337 U.S. at 52-53.

62. *Id.* at 50.

63. *See, e.g., Thornwell*, 471 F. Supp. at 348; Everette v. United States, 492 F. Supp. 318, 320-22 (S.D. Ohio 1980).

64. *See* Lombard v. United States, 530 F. Supp. 918, 921 (D.D.C. 1981); Kelley v. United States, 512 F. Supp. 356, 361-62 (E.D. Pa. 1981).

65. The court applied the *Feres* doctrine to a veterans claim of constitutional violations for intentionally exposing him to radiation. Jaffee v. United States, 663 F.2d 1226, 1228 (3rd Cir. 1981), *cert. denied*, 102 S. Ct. 2234 (1982); *see also* 471 F. Supp. at 353.

66. *See* Ryan v. Cleveland, 531 F. Supp. 724, 730-33 (E.D.N.Y. 1982).

67. *Id.* at 733-34.

68. 663 F.2d 1226 (3rd Cir. 1981) *cert. denied*, 102 S. Ct. 2234 (1982).

69. *Id.* at 1243.

70. *Id.*

claim under the Veterans Benefits Act[71] which precluded other recovery. Further, the court stated that if it allowed suits under this cause of action it would affect military decisions and military discipline.[72] The refusal of the Supreme Court to hear the *Jaffee* case leaves the acceptance of damages for constitutional violations in radiation cases an open issue.

Veterans have also sought tort recovery for children born with genetic defects allegedly caused by their father's exposure to radiation or Agent Orange during his military service.[73] The federal courts are split in this area; the Ninth Circuit has denied recovery[74] but the Eastern District for Pennsylvania has allowed recovery.[75] In *Hinkie v. United States*[76] the District Court of Pennsylvania analyzed the claim of the chromosome damaged child under the criteria for allowing recovery outlined in *Feres* and *Stencel* and determined that the instant cause of action complied with the requirements of the two earlier cases.[77] The court stated that the child's claim was not incident to service nor derivative of the serviceman's claim[78] and that therefore, recovery should be allowed.[79] In contrast, in *Monaco v. United States*,[80] the Ninth Circuit Court of Appeals reluctantly denied the damaged child's claim even though she was unable to collect under the Veterans Benefits Act.[81] The court determined that allowing the child a cause of action would cause the court to examine military decisions, exactly what *Feres* sought to avoid.[82]

Another theory used by veterans to overcome military immunity is the post-service tort, a variation of the reasoning used in *Brooks* and expanded by *Brown v. United States*.[83] Judicial definition and acceptance of the post-service tort will be the topic of the remainder of this comment.[84]

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71. *Id.* at 1231-33.

72. *Id.*

73. *See* Monaco v. United States, 661 F.2d 129, 130 (9th Cir. 1981); Hinkie v. United States, 524 F. Supp. 277, 279 (E.D. Pa. 1981).

74. *See* 661 F.2d at 134 (denying recovery).

75. *See* 524 F. Supp. at 279, 282 (allowing recovery).

76. 524 F. Supp. 277 (E.D. Pa. 1981).

77. *See Id.* at 283.

78. *See Id.* at 281-83.

79. *See Id.* at 284.

80. 661 F.2d 129 (9th Cir. 1979).

81. *Id.* at 134.

82. *Id.*

83. 348 U.S. 110 (1954).

84. *See* Comment, *supra* note 41 (general discussion of the same topic).

THE DEVELOPMENT OF THE POST-SERVICE TORT

A. History of the Post-Service Tort Claim

The post-service tort claim is a claim for damages caused by post-service military negligence;[85] the claim is for injuries which were *caused after*[86] discharge even though the original injury occurred during service, therefore, recovery is not barred by the *Feres* doctrine.[87]

The first case to allow recovery based on the occurrence of the tort after service was *Brown v. United States*.[88] Brown, a serviceman, was injured while on military duty.[89] After his discharge Brown was treated at a V.A. hospital.[90] The V.A. doctor negligently injured Brown during surgery.[91] Brown sued the government for the injuries caused by the post-service surgery.[92] The Supreme Court allowed Brown to recover for the injuries caused by the doctor after discharge even though the injury that made surgery necessary occurred during active military duty.[93] The *Brown* case is not only important because it allowed recovery for a post-service injury which originated during service, but also because it distinguished *Brooks* from *Feres* by holding that injuries not arising out of military service are not barred by *Feres*.[94] The United States Supreme Court also ruled that a veteran can collect both V.A. benefits for his in-service injury and damages in tort under the F.T.C.A. for injuries caused by the government's negligence which occured after discharge.[95]

In *Schwartz v. United States*,[96] ten years after Brown, the United States District Court in Pennsylvania awarded $725,000 under the F.T.C.A. to a veteran for injuries suffered due to medical malpractice occurring after his discharge.[97] Schwartz, while in the service, submitted to X-rays in order to determine the cause of his breathing problems.[98] During the X-ray a radioactive dye, known to be dangerous, was inserted in his sinus and never removed.[99] Schwartz returned to V.A. hospitals many times and because the doctors never sent for

85. *See* Everette v. United States, 492 F. Supp. 318, 326 (S.D. Ohio 1980).
86. *Id.*
87. *Id.*
88. 348 U.S. 110 (1954).
89. *Id.* at 110-11.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 112-113.
94. *Id.*
95. *Id.* at 113.
96. 230 F. Supp. 536 (E.D. Pa. 1964).
97. *Id.* at 543.
98. *Id.* at 537.
99. *Id.* at 538.

Schwartz's medical records, the dye was not found.[100] The dye caused cancer and a portion of Schwartz's face was removed.[101] In holding the government liable, the court noted that the actionable negligence was not the original insertion of the dye used for X-rays which occurred during the veteran's military service.[102] Rather, the liability was imposed because the military had a duty to seek out this type of patient and warn him of this danger.[103]

In *Toal v. United States*,[104] the Second Circuit followed *Schwartz* by allowing recovery for a post-service tort. The court held that the failure of a doctor to file a notation in Toal's medical records regarding his treatment with a radioactive dye caused the dye to go unnoticed after Toal's discharge resulting in brain damage.[105] Recovery was allowed for the failure to warn Toal of the presence of the dye after discharge.[106]

B. The Post-Service Tort is Expanded Beyond Malpractice Claims

The first nonmedical malpractice claim to apply the post-service tort was *Thornwell v. United States*.[107] This case brought to the attention of the public the use of servicemen as human "guinea pigs". Thornwell, an army private stationed in Germany, was injected with L.S.D. for the purpose of determining the utility of this drug during interrogation.[108] The military never informed Thornwell of the injection.[109] Since the L.S.D. injection, Thornwell has suffered serious mental illness and severe physical pain.[110] Moreover, he has been unable to carry on a normal life.[111] Thornwell did not discover he had been injected with L.S.D. until seventeen years later.[112] Thornwell sought recovery based on the failure of the government to provide follow up medical treatment and failure to inform him after his discharge that he had been given L.S.D. during his military service.[113] The court held that recovery for post-discharge injuries was not only consistent with *Feres* but

100. *Id.*
101. *Id.* at 539.
102. *Id.* at 540.
103. *Id.*
104. A veteran was allowed recovery when the military doctor assured him that the radioactive dye used for x-rays need not be removed and later lodged in his brain causing damage. Toal v. United States, 438 F.2d 222, 225 (2nd Cir. 1971).
105. 438 F.2d at 225.
106. *Id.*
107. 471 F. Supp. 344 (D.D.C. 1979).
108. *Id.* at 346.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 349.

"compelled by *Brown*."[114] Although Mr. Thornwell learned that he was harmed during active duty, there was a separate tort after discharge, for failure to rescue Thornwell from the danger created by the government.[115] The court recognized a cause of action for this separate tort of failure to warn and stated that Thornwell could recover to the extent that the failure to warn aggravated or prolonged his condition.[116]

C. The Limiting of Thornwell

Since *Thornwell*, veterans have attempted to rely on that case as precedent to recover for injuries caused by exposure to radiation, Agent Orange, and mustard gas.[117] Some courts have distinguished the particular cases on the facts.[118] Many courts require the in-service tort to be intentional[119] while other courts have rejected the post-service tort for a variety of reasons.[120] There does not seem to be any consensus among the courts as to the scope or limitation of *Thornwell*.

1. Acceptance of the Post-Service Tort if the Original Tort is Intentional[121]

In *Thornwell*, the in-service tort of injecting the L.S.D. was intentional; however, the court stated that when the military performed two negligent acts, one during service and one after discharge, a veteran may recover for the later negligent act.[122] This language clearly indicates that the first act does not have to be intentional.[123] Nevertheless, some courts have interpreted this holding as requiring the in-service tort to be intentional.[124] In *Stanley v. C.I.A.*,[125] the Fifth Circuit Court of Appeals held that the plaintiff failed to allege an intentional in-ser-

114. *Id.* Like the plaintiff in *Brown*, Mr. Thornwell was a civilian at the time defendants allegedly failed to provide him with adequate care and treatment and thus, under *Brown* he has stated the elements of a valid claim. *Id.* at 349-50.

115. *Id.* at 352; *see* Comment, *supra* note 41, at 267.

116. *Id.* at 352-53. Thornwell alleged since his discharge four months after the L.S.D. experiment he has suffered and continues to suffer serious mental and physical illnesses and that he has been unable to maintain any job and that he is an emotional cripple. *Id.* at 346-47.

117. *See supra* notes 3, 4.

118. *See supra* note 64.

119. *See, e.g.*, Stanley v. CIA, 639 F.2d 1146, 1153-54 (5th Cir. 1981); Kelley v. United States, 512 F. Supp. 356, 360-61 (E.D. Pa. 1981).

120. *See, e.g.*, Sweet v. United States, 528 F. Supp. 1065, 1073-74 (S.D. 1981); Schnurman v. United States, 490 F. Supp. 429, 436-37 (E.D. Va. 1980).

121. Intentional as used in this comment refers to the situations in which the military exposed servicemen to radiation aware of the possible harm it could cause.

122. Thornwell v. United States, 471 F. Supp. 344, 352-53 (D.D.C. 1979).

123. *Id.*

124. *See, e.g.*, 639 F.2d at 1153-54; Lombard v. United States, 530 F. Supp. 918, 920 (D.D.C. 1981).

125. 639 F.2d 1146 (5th Cir. 1981).

vice tort and therefore did not state a cause of action under *Thornwell*, even though the facts of the case were similar.[126] In *Sweet v. United States*[127] a United States District Court for South Dakota also stated on facts similar to *Thornwell*, that intent was required, however, the case was dismissed because the plaintiff failed to meet the statute of limitations.[128] In *Schnurman v. United States*,[129] the United States District Court, Eastern District in Virginia stated that no recovery would be allowed because the in-service tort was not intentional; this case was also dismissed because of the statute of limitations.[130] In *Lombard v. United States*[131] the Eighth Circuit Court of Appeals denied recovery to a veteran because his exposure to radiation was in the course of duty and not intentional.[132] Veterans' claims for injuries allegedly caused by exposure to Agent Orange have also been denied because the exposure was unintentional.[133] The courts have stated that the purpose of using Agent Orange was not to experiment but rather to defoliate the jungle which was a proper military motive.[134]

2. Some Courts Have Rejected the Post-Service Tort

Some courts have distinguished the facts of a particular case before them from *Thornwell*, classifying the tort as a continuous one and thus rejecting the post-service tort[135] theory. Courts taking this approach have based their decision on the fact that the plaintiffs remained in the service for a period of time after the first tort occurred,[136] thus, the second tort, the failure to warn the serviceman, was held to be merely a continuance of the first tort.[137]

Several cases have departed from the holding of *Thornwell* on facts

126. Recovery was denied when a volunteer was injected with L.S.D. and has since suffered psychological problems. *Id.* at 1148.

127. 528 F. Supp. 1068 (D.S.D. 1981) (voluntarily participated in L.S.D. experiments and since then has suffered nervous spells).

128. *Id.* at 1073-74.

129. 490 F. Supp. 429 (E.D. Va. 1980). Plaintiff voluntarily participated in an experiment to test protective clothing and was exposed to mustard gas and was never informed of the injuries it could cause. Plaintiff has suffered a variety of ailments since then. *Id.* at 431-32.

130. *Id.* at 435.

131. 530 F. Supp. 918 (D.D.C. 1981). The Thornwell case was also decided in the District of Columbia so it would seem that the court has interpreted *Thornwell* as requiring the original tort to be intentional.

132. *Id.* at 920-21; Lombard was exposed to radiation while handling and transporting radioactive equipment. *Id.* at 919.

133. *See In re* Agent Orange Litigation, 506 F. Supp. 762, 777.

134. *Id.* at 779.

135. Stanley v. CIA, 639 F.2d 1146, 1154 (5th Cir. 1981).

136. *See* Stanley v. CIA, 639 F.2d 1146, 1149 (5th Cir. 1981) (remained in the service eleven years after the experiment); Fountain v. United States, 533 F. Supp. 698, 700 (W.D. Ark. 1981) (remained in the service eight years after exposure). *But cf.* Kelley v. United States, 512 F. Supp. 356 (E.D. Pa. 1981) (interprets the tort as beginning immediately after exposure and denies recovery).

137. *See supra* note 125.

so similar to *Thornwell* that their holdings impliedly or expressly reject the post-service tort. In *Laswell v. Brown*[138] the Eighth Circuit Court of Appeals has expressly rejected the post-service tort.[139] Laswell, during service in the Navy, was stationed off Eniwetok Atoll.[140] He observed three atomic explosions from his ship.[141] After the third explosion he was ordered to participate in the construction of an airstrip less than one mile from the blast sight.[142] Laswell alleged that while building the airstrip, he was exposed to radiation.[143] Laswell was diagnosed as having Hodgkins disease caused by exposure to low level radiation.[144] The disease ultimately caused his death in 1979.[145] The court rejected the post-service tort using the rationale of *Feres*.[146] The United States District Court, Eastern District of Pennsylvania also followed *Laswell* in *Kelley v. United States*.[147] The court, however, did not expressly reject the post-service tort.[148] Kelley was exposed to radiation while stationed in the South Pacific during atomic testing and developed cancer as a result of the exposure.[149] The court refused to find a separate tort for the failure to warn, stating that it found no difference in the failure to warn Kelley before he was exposed and the failure to warn him after discharge.[150] The court in *Kelley* avoided express rejection of the post-service tort by finding that Kelley did not allege a similar post-service tort.[151] The *Schnurman* case also interpreted the original tort as a continuous one and analogized the facts to two medical malpractice cases where the courts refused to find two separate torts.[152] Despite the narrow interpretation or rejection by the federal court of *Schwartz* and *Thornwell*, two recent decisions have given a post-service tort claim to veterans.

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138. 524 F. Supp. 847, 848 (W.D. Mo. 1981) *affd.* 683 F.2d 261 (1982). Plaintiff died of Hodgkins disease caused by radiation exposure.

139. 524 F. Supp. 847, *affd.* 683 F.2d 261 (1982) "The court declines to follow *Jaffee, Thornwell*, and *Everette* to the extent they are inconsistent with this opinion." *Id.* at 850.

140. *Id.* at 848.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 850.

147. 512 F. Supp. 356 (E.D. Pa. 1981).

148. "Having reviewed the precedent to date, like the Fifth Circuit in Stanley, I see no need to reach the issue of whether Thornwell and Everette were correctly decided." *Id.* at 360.

149. *Id.* at 357.

150. *Id.* at 360-61.

151. *Id.* at 360.

152. *See generally* Henning v. United States, 446 F.2d 774 (3rd Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972) (failure to inform a veteran of the true content of x-rays which had been taken while he was on active duty); Wisniewski v. United States, 599 F. Supp. 559 (E.D. Wis. 1976) (failure to provide him either before or after discharge with the results of a blood test taken while he was in the service) In these cases the court refused to find two separate torts and applied the *Feres* doctrine to prevent recovery.

3. *Current Acceptance of the Post-Service Tort*

The two most recent cases allowing a post-service tort cause of action involved veterans who have contracted cancer allegedly due to their exposure to radiation during military service.[153] In *Everette v. United States*,[154] the United States District Court, Southern District of Ohio, granted a cause of action for damages brought about by the military's failure to warn Mr. Everette after he left the military of the harmful effects that exposure to radiation during military service could cause.[155] The action was brought by his spouse against the United States to recover for Mr. Everette's wrongful death.[156] Mr. Everette was exposed to radiation when he was ordered to march through a nuclear blast area less than one hour after detonation of an atomic bomb.[157] Mrs. Everette's complaint alleged that the exposure was intentional and caused cancer.[158] The court admitted the possibility that the purpose of the exposure was to determine what effect an atomic explosion would have on the troops but nonetheless held that the failure to inform Everette of his exposure to radiation was a separate tort for which he could recover.[159]

The Ninth Circuit Court of Appeals took a different approach in *Broudy v. United States*.[160] The court granted a limited cause of action to a wife whose husband died from a form of cancer that has been linked to low level radiation.[161] Major Broudy was ordered to participate in maneuvers in the vicinity of at least two atomic bomb explosions.[162] The complaint alleged that the maneuvers were conducted for the express purpose of studying how well troops could withstand an atomic blast.[163] Major Broudy was never informed of the dangers associated with radiation.[164] The court held that Major Broudy's wife could recover damages only if she could prove that the military learned of the dangers of radiation after he was discharged and that the failure of the military to warn him caused further injury.[165] This novel holding makes recovery dependent on whether or not the military was

153. *See* Everette v. United States, 492 F. Supp. 318, 319-20 (S.D. Ohio 1980).
154. 492 F. Supp. 318 (S.D. Ohio 1980).
155. *Id.* at 326.
156. *Id.* at 320.
157. *Id.*
158. *Id.* at 319.
159. *Id.* at 320, 326.
160. 661 F.2d 125 (9th Cir. 1981).
161. *Id.* at 126.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at 129.

aware of the danger during the time the plaintiff served.[166] The *Broudy* holding implies that *regardless* of military awareness of danger at the time of exposure, and *regardless* of military failure to warn after discharge, the veteran may not recover *unless* exposure to the substance was negligent, that is, the military was not aware of the dangerous nature of the substance until after discharge.[167] *Broudy* creates the anomalous situation of allowing recovery only where negligence on the part of the military can be proven after discharge. Intentional exposure to dangerous substances for testing purposes seems to be condoned.[168] This holding is a departure from the post-service tort as defined in *Thornwell* and *Everette* because the military has a duty to warn a veteran what he has been exposed to during service even if the military was aware of the danger at the time of exposure.[169]

D. Current State of the Law

Under the current state of the law there are three points of view concerning the post-service tort: (1) recovery should be allowed if the original tort is intentional;[170] (2) recovery should be allowed only if the government learned of the possible harm to the serviceman after discharge;[171] and (3) recovery under a post-service tort theory should not be allowed.[172]

Only the *Broudy* and *Laswell* cases have reached the appellate level creating uncertainty of the law in the federal courts. If a forum has not decided the issue, a veteran should use inconsistent pleading when bringing a claim based on the post-service tort theory.[173] A veteran bringing suit should be able to allege that the government knowingly and intentionally exposed him to a toxic substance and that further, the government was negligent in failing to warn him after discharge of the known harmful effects of the substance. This should bring the plaintiff under *Everette*. Alternatively, to come under *Broudy*, the veteran should be able to allege that the government exposed him to a substance and that after his discharge the government learned of its dangerous nature yet failed to inform him, and that failure to inform was

166. *Id.*
167. *Id.*
168. *Id.*
169. *See Id.* at 128-29.
170. Everette v. United States, 492 F. Supp. 318 (S.D. Ohio 1980) (original tort intentional).
171. 661 F.2d 125 (recovery only if the government becomes aware of the danger after discharge).
172. Laswell v. Brown, 524 F. Supp. 847, 849-50 (W.D. Mo. 1981) (no post-service tort).
173. *Broudy* seems to only allow recovery if the government learns of the dangers of radiation after discharge. This indicates that the government would not be liable under *Thornwell* if the government knowingly exposed a soldier to radiation and then failed to warn him afterwards. However, the case has not been tried as of the writing of this article.

the cause of his injuries. No matter which approach is taken by a court, *Everette, Broudy*, or a new theory, it must not contradict the reasons given by the Supreme Court for upholding military immunity.[174]

THE POST-SERVICE TORT IS CONSISTENT WITH THE COURT CREATED RATIONALE FOR MILITARY IMMUNITY

The Supreme Court has chosen to treat the military differently than any other governmental agency by not allowing governmental liability under the F.T.C.A.[175] The court has upheld the *Feres* doctrine of military immunity for several reasons: the absence of analogous liability in similar circumstances; the special relationship between the military and the government; the effect suits would have on the maintenance of discipline; the unfairness of permitting service related claims for damages to be determined by laws differing from state to state; and the existence of a comprehensive statutory system of compensation benefits.[176] Courts have interpreted these analyses differently, and the Supreme Court has abandoned some of the reasons offered and emphasized others.[177] Twenty-seven years after *Feres*, the Supreme Court used basically the same framework in the decision reached in *Stencel v. United States*.[178] The Court analyzed the facts of *Stencel* to determine if granting recovery would interfere with the military in the ways that the *Feres* court sought to avoid.[179] When analyzed in light of *Feres*, the post-service tort does not conflict with any of the reasons expressed by the Court for upholding military immunity.[180] This comment will demonstrate that none of the rationale expressed in *Feres* will be abrogated by allowing recovery under a post-service tort theory and therefore this theory should be accepted by the courts.

A. Absence of Private Liability in Similar Circumstances

The United States Supreme Court has retreated from the position that there must be private liability in similar circumstances, before governmental liability can be found.[181] In *Indian Towing v. United*

174. Stencel v. United States, 431 U.S. 666, 670 (1977). "It is necessary, therefore, to examine the rationale of *Feres* to determine to what extent, if any, allowance of petitioners claim would circumvent the purposes of the Act as construed by the court." *Id.* at 670; *See* Comment, *supra* note 41, at 278-80.

175. *See* Feres v. United States, 340 U.S. 135, 141-43 (1950).

176. *See Id.* at 141-43.

177. *See* Note, *supra* note 48, at 1102-12.

178. *See* 431 U.S. 666, 670-74 (discusses *Feres* and the problems it sought to avoid).

179. *See* Stencel v. United States, 431 U.S. 666, 672-73 (1977); Comment, *supra* note 41, at 270.

180. *See* Comment, *supra* note 41, at 278-79.

181. *See* L. JAYSON, HANDLING FEDERAL TORT CLAIMS 5-89 (1967).

States[182] the Court allowed recovery for the government's negligent maintenance of a light house even though maintaining lighthouses is solely a governmental function.[183] Subsequently, in *Rayonier v. United States*,[184] a case involving negligence of federal firefighters, the Court rejected the argument that because private citizens do not engage in a type of activity, no governmental liability should be allowed.[185] In *United States v. Muniz*,[186] claims by federal prisoners against the government were allowed.[187] The Court held that liability may be imposed on the United States under the F.T.C.A. even though under state law both the state and the jailer would be immune from a similar suit.[188] These cases indicate that the Supreme Court is willing to hold the government liable in situations where the government alone engages in the activity giving rise to the suit and there is no comparable private liability. In *Stencel*, the most recent case to consider military immunity, the court alluded to this factor but did not rely on the absence of private liability for the holding.[189] As a result of *Rayonier*, *Indian Towing*, and *Stencel*, this portion of the *Feres* doctrine is no longer a necessary factor.[190] Therefore, merely because the federal government has the exclusive privilege to raise an army, and there would therefore be no analogous private liability, recovery should not be precluded.[191]

B. The Special Relationship Between the Military and the Government

The second factor relied upon by the *Feres* Court was the relationship between a sovereign and the members of its armed forces being unlike any relationship existing between private individuals.[192] This is the most substantial argument used in maintaining military immunity and the one that was recently emphasized in *Stencel*.[193] Some authors believed that this factor had been narrowly construed to forbid only causes of action that would interfere with military discipline.[194] In *Stencel* however, the Court analyzed the facts in light of the fear of

182. 350 U.S. 61 (1955).
183. *See Id.* at 64-65.
184. 352 U.S. 315 (1956).
185. *Id.* at 318-19.
186. 374 U.S. 150 (1963).
187. *Id.* at 152.
188. *See* Jayson, *supa* note 181, at 5-89.
189. *See* Stencel v. United States, 431 U.S. 666, 671-73 (1977).
190. JAYSON, *supra* note 181, at 5-89.
191. *Id.*
192. *See* Feres v. United States, 340 U.S. 135, 141-42 (1950).
193. *See* 431 U.S. at 672.
194. Note, *supra* note 47 at 1111.

interference with military discipline as well as the distinct relationship existing between the military and the government.[195] Use of these factors to analyze the post-service tort demonstrates that the post-service tort is compatible with the concerns of the Supreme Court in preserving government immunity.[196] In *Stencel* the Court stated that the armed services perform a unique nationwide function of protecting the United States and that there are significant risks in that undertaking.[197] The Court would not interfere with military autonomy in carrying out the function of protecting the country by allowing recovery for the failure to provide follow up care or for failing to inform a veteran of the harmful substances he had been exposed to during his military service.[198] Liability would only be imposed for governmental negligence after the soldier is discharged from the military.[199] The plaintiff would then be a civilian at the time of the wrong[200] and the judges would not be second-guessing military orders in the field as feared by the Court in *Feres*.[201] The government would merely have a duty to rescue a veteran from his position of danger after discharge.

Moreover, this type of recovery would not disrupt military discipline as feared by the courts.[202] Failure to warn after service is a separate tort occurring after discharge; military decisions made during service would not be questioned.[203] As in the *Brown* case, the act in question would occur after discharge, therefore the post-service tort does not involve negligent orders or negligent acts committed in the course of military duty.[204] The duty of informing veterans of their exposure to substances would be an administrative procedure that could be implemented through the V.A.. This duty would not involve daily military command decisions nor battlefield discipline, but rather, only decisions relating to veterans after their discharge.

Everette, *Broudy*, and *Thornwell* are all similar to *Brown* since recovery was allowed even though the original tort occurred during service.

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195. *See* 431 U.S. at 672-73.
196. *See* Comment, *supra* note 41, at 279-80.
197. *Id.* at 672. Justice Marshall along with Justice Brennan, who joined in his dissent, undermined this rationale by noting that many federal agencies perform unique, nationwide functions and yet liability under the FTCA had not impaired their efficiency. *Id.* at 675 (Marshall, J., dissenting).
198. *See* Comment, *supra* note 41, at 279-80.
199. *See* Everette v. United States, 492 F. Supp. 318, 326 (E.D. Va. 1980); Thornwell v. United States, 471 F. Supp. 344, 353 (D.D.C. 1979).
200. *See* United States v. Brown, 348 U.S. 110, 112. Plaintiff was a civilian at the time of his injuries and his injuries did not arise out of service; *Id.* at 113; *See generally* Bankston v. United States, 480 F.2d 495 (5th Cir. 1973) (remanded to determine if plaintiff had been discharged at the time of malpractice).
201. *See Feres*, 340 U.S. at 141-142.
202. *See* 492 F. Supp. at 321; 471 F. Supp. at 351.
203. *See* 492 F. Supp. at 321; 471 F. Supp. at 351.
204. *See* Comment, *supra* note 41, at 280-81.

In *Brown* the Supreme Court stated that no threat to military discipline was imposed since the claim was brought by a discharged veteran.[205] Conscience dictates that when servicemen are used as human guinea pigs or sprayed with a chemical that later is discovered to be highly toxic, the government, at the very least, should have a duty to inform the veteran of the peril.[206] This slight infringement on military autonomy would not prevent the military from performing its "unique function" of national defense. In the past, the courts have infringed on military autonomy when the rights of servicemen were receiving less protection than a court would provide and the judicial infringement on military discipline and autonomy was not great.[207] Military jurisdiction was thus reduced in *Toth v. Quarles*[208] when the United States Supreme Court struck down court-martial jurisdiction over veterans accused of serious crimes committed while on active duty.[209] The Court reasoned that since Toth was discharged, the military's need for jurisdiction was not great enough to justify the abridgement of personal rights entailed by military jurisdiction.[210] The Court again cut back military jurisdiction over active personnel when it held that if an alleged crime of an active duty member of the armed forces is not "service connected," no military necessity exists to justify military jurisdiction.[211]

The type of recovery the post-service tort allows would comport with the reasoning used by the Court in reducing military jurisdiction because it would not allow scrutiny of military decisions; rather, recovery is allowed only for injuries sustained after discharge.[212] In cases where servicemen have been exposed to toxic substances and the government has failed to inform them, judicial interference is justified in order to allow compensation for a grievous wrong.[213]

C. The Unfairness Factor

Both *Feres* and *Stencel* stressed the unfairness of exposing military

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205. *See* 348 U.S. at 112.
206. *See* Comment, *supra* note 41, at 280-81.
207. *See, e.g.*, O'Callahan v. Parker, 395 U.S. 258, 266-67 (1969) (the court cut back military jurisdiction for alleged crimes during active duty when the crimes were not service related); Muniz v. United States, 374 U.S. 150, 165 (1963) (the court allowed federal prisoners to recover who had been injured due to negligence of federal employees because the claim would not interfere with prison discipline).
208. Toth v. Quarles, 350 U.S. 11 (1950).
209. *Id.* at 21-22.
210. *Id.*
211. *See* O'Callahan v. Parker, 395 U.S. 258, 266-67 (1969); For a general discussion on this subject, see Note, *supra* note 47, at 1114-1115.
212. *See* Brown v. United States, 348 U.S. 110, 112 (1954).
213. *See* Comment, *supra* note 41, at 281.

personnel to varying laws and standards of care as provided by the F.T.C.A. when recovery is allowed under the law of the state where the tort occurs.[214] It is important to note that the Supreme Court did not mention this as a factor when allowing recovery in *Brown*.[215] This omission is most likely because Brown was a civilian at the time the tort occurred.[216] As stated previously, the post-service tort under either definition allows recovery only for the damages caused after service when the veteran has a civilian status.[217] Therefore, the fairness factor should not be used as a rationale in denying recovery grounded on the post-service tort. As the Supreme Court later stated in *United States v. Muniz*,[218] it is more unfair to deny recovery at all than to be concerned with the mere application of nonuniform state laws.[219] Courts have rationalized the need of a uniform set of laws to govern military activities on the basis that the military performs the vital task of protecting the country.[220]

Local tort law, however, is routinely applied to the armed forces despite this concern.[221] The armed forces are subject to diverse standards of care and liability when they are in contact with civilians, dependents living on military bases, public carriers, military physicians, and military hospitals.[222] Since a veteran is free to go where he chooses, the rationale that state laws are not uniform and therefore unfair to a serviceman who has no control over his location should not be a barrier to the acceptance of the post-service tort. The only factor remaining in the *Feres* doctrine that could prevent the acceptance of the post-service tort is the existence of statutory compensation for service related injuries.

D. The Existence of a Statutory System of Compensation

Beginning with *Feres*, the courts have consistently denied tort recovery for service related injuries relying on the "simple, sure and uniform remedy" supposedly provided by the Veterans Compensation Statute.[223] The Veterans Compensation Statutes provide statutory benefits for veterans who have been injured during service.[224] In *Stencel*, the

214. Stencel v. United States, 431 U.S. 666, 672 (1977); Feres v. United States, 340 U.S. 135, 143 (1950).
215. *See* 348 U.S. at 112.
216. *Id.*
217. *See supra* note 3.
218. 374 U.S. 150 (1963).
219. *Id.* at 162.
220. *See* 431 U.S. at 672.
221. Note, *supra* note 48, at 1120-21.
222. *Id.*
223. 340 U.S. at 144.
224. *Id.*

Court stated that statutory benefits were supposed to place an upper limit on recovery, however, the statute itself does not state this.[225] In *Brown* and the earlier *Brooks* case, the United States Supreme Court held that a veteran may recover under the F.T.C.A. for an injury sustained even though he was entitled to, and did receive, veteran's disability payments.[226] In *Brown* the Court reaffirmed *Brooks* and distinguished the case from *Feres*[227] holding that in situations in which the injury is unrelated to a person's service or occurred after his military discharge, veterans compensation did not preclude tort recovery and the veteran's compensation payments could be subtracted from the tort award.[228] As stated previously, the post-service tort theory is an extension of the holdings in *Brooks* and *Brown*.[229] The theory is similar to *Brown* in that recovery sought is for injuries occurring after service.[230] Therefore, as in *Brown*, the availability of veterans, compensation should not bar recovery for injuries incurred after service.[231]

It is also important to note that veterans compensation is not a certain remedy.[232] Furthermore, unlike worker's compensation benefits, veteran's benefits have been considered a mere gratuity that can be revoked for a variety of reasons.[233] Therefore, veterans benefits are not compensating veterans exposed to radiation who have contracted cancer[234] as only sixteen veterans have been awarded benefits.[235] Moreover, these claimants are only entitled to receive $1,130 per month and their widows may receive only $500.[236] This low rate of V.A. recovery is attributed to the fact that it is difficult to prove that radiation exposure caused the cancer.[237] The causation problem, combined with the

225. 431 U.S. at 672-73; *see* 340 U.S. at 113; 38 U.S.C. §§1-5228 (1976).

226. Brooks v. United States, 337 U.S. 49, 53 (1949) "We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so." *Id.*; *see also* Note, *supra* note 48, at 1108-9.

227. *See* 348 U.S. at 112-13.

228. *Id.* at 113.

229. *See supra* notes 88-96 and accompanying text.

230. *Thornwell*, 471 F. Supp. at 349-50.

231. 348 U.S. at 113.

232. *See* Silberschein v. United States, 226 U.S. 221, 225 (1924) (benefits considered a gratuity).

233. Veterans benefits can be forfeited temporarily during imprisonment, 38 U.S.C. §505(a) (1976), for conviction of sabotage, *Id.* §3504(a), or subversive activities, *Id.* §3505, and a veteran will not receive benefits if discharge was for reasons other than honorable. *Id.* §331; *see* Note, *supra* note 48, at 1107-08.

234. *See* De Dominicis, *supra* note 4, at 31.

235. *Id.*

236. *Id.*

237. The V.A.'s doctrine of "reasonable doubt" contrasts sharply with the allocation of the burden of proof in a civil case.

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> Even if the V.A.'s doctrine of "reasonable doubt" did mean that the V.A. carried the burden of persuasion, the burden of producing evidence would still remain as it does,

V.A. procedure which places the burden of proof on the veteran, virtually precludes a veteran's recovery in radiation and Agent Orange cases.[238] Since V.A. decisions are not appealable, a veteran can walk into a V.A. office with affidavits from scientists, physicians, and physicists saying that the problem is caused by radiation, and the V.A. can deny it.[239] There is no appeal.[240] So, in spite of the V.A.'s statutory scheme, veterans exposed to toxic substances during or after service are receiving no compensation for their injuries.[241] Unless they are given a court remedy, with a more favorable burden of proof, veterans will be unable to recovery for these injuries.[242]

When the post-service tort is examined in light of the reasons given for military immunity, it is evident that since the recovery is for damages which occur *after* service, the cause of action will not interfere with military discipline nor the military function of defending the country.[243] Modernly, V.A. benefits have not been interpreted as placing an upper limit on liability.[244] As a practical matter the benefits are not compensating these veterans as the courts have expected.[245] Therefore, the post-service tort remedy is consistent with *Feres* and *Stencel* and should be accepted by the courts. The post-service tort would impose a duty on the government to inform veterans of their exposure to harmful substances and would require follow up care after discharge.[246] The imposition of this duty could prevent the birth of defective children to chromosome-damaged servicemen and prevent the early deaths of servicemen who, once informed of their exposure, could seek early medical care.[247] The frequency of new medical discoveries make the cure for cancer and other diseases more likely. Surely a veteran should have the right to know of the possibility of contracting cancer so he may take advantage of these medical break-throughs. In any case, a veteran should be made aware of the increased potential for these diseases so an early medical treatment can be sought. As Justice Richey stated in *Thornwell*, when referring to the military, "the perpe-

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with the claimants. Because of the evidentiary void involved in these case, the V.A.'s high rate of rejection for such claims is not surprising.

Comment, *supra* note 1, at 958-59 [citations omitted].

238. *See* Comment, *supra* note 1, at 958-60.

239. De Dominicis, *supra* note 4, at 34 (quoting NAAV general counsel E. Cooper Brown).

240. *Id.* at 31.

241. *Id.*

242. *Id.*

243. *See* Comment, *supra* note 41.

244. *See* Brown v. United States, 348 U.S. 110, 113 (1954).

245. De Dominicis, *supra* note 4, at 34.

246. *See Thornwell*, 471 F. Supp. at 350-53.

247. *See generally* Stanley v. CIA, 639 F.2d 1146, (5th Cir. 1981); Fountain v. United States, 533 F. Supp. 698 (W.D. Ark. 1981); Laswell v. Brown, 524 F. Supp. 847 (W.D. Mo. 1981) (all demonstrations of deaths that were allegedly radiation related).

trators of this wrong must be held accountable for their conduct."[248] It is the duty of the court to protect these veterans since Congress has refused to interfere with court-created military immunity.[249] Veterans who risk their lives for this country should not go uncompensated for severe injuries inflicted upon them by government.

CONCLUSION

This comment has demonstrated the harsh results produced by the doctrine of military immunity. The military has exposed servicemen to toxic substances and used them as human "guinea pigs" and then discharged them ignorant of their fate.[250] Veterans have had little success with their attempts to penetrate this immunity.[251] Private Thornwell was successful in using the Supreme Court's reasoning in the *Brooks* and *Brown* decisions and recovered for his injuries which were incurred after his discharge.[252] This cause of action permitted a court remedy for the failure by the government to inform a veteran of what had been done to him and for the failure by the government to provide follow up care to veterans known to have been used in experimentation.[253] Unfortunately, this post-service tort has not been accepted by some federal courts. The courts denying recovery have failed to distinguish the original tort of exposure from the subsequent tort of the government's failure to warn after discharge.[254] Recently the Ninth Circuit Court of Appeals in *Broudy v. United States*, and the Eastern District Court of Pennsylvania in *Everette v. United States* have allowed post-service tort recovery.[255] However, due to the different interpretations of the theory there still exists much confusion in this area of the law. In order for the Supreme Court to accept the post-service tort theory, it must withstand scrutiny under the court created reasons for military immunity.[256] This comment has analyzed the post-service tort theory under the Court's rationale for government immunity and has demonstrated that since the theory allows recovery only for injuries caused after service, recovery will not interfere with military autonomy. Military officers will not be on trial for their command decisions since the recovery is post service and the duty arises only upon discharge. A procedure for warning

248. 471 F. Supp. at 352.
249. *See generally*, Comment, *supra* note 41 (this Comment also advocates acceptance of the post-service tort).
250. *See supra* notes 1-3 and accompanying text.
251. *See supra* notes 63-65.
252. *See generally Thornwell*, 471 F. Supp. 344.
253. *Id.*
254. *See supra* notes 119-120.
255. *See supra* notes 85 & 160 and accompanying text.
256. Stencel v. United States, 431 U.S. 666, 670 (1977).

veterans can be effected through the V.A. and therefore will not interfere with the special function of the military in protecting the country. In addition, this comment has demonstrated that the courts cannot justify denial of a tort remedy because of the simple, sure remedy supposedly provided by veterans compensation. The government exposed thousands of servicemen to radiation and Agent Orange. These veterans are not receiving any redress for their injuries. Unless the courts accept the post-service tort these veterans will remain uncompensated.

Lorna Hislop-Brumfield